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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: APR 02 2007

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a research associate. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for the classification sought but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a personal statement and submits additional evidence. For the reasons discussed below, we uphold the director's decision.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Chemistry from Washington University in St. Louis. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, cellular protein research. The proposed benefits of her work include an improved understanding of the ubiquitin system regulating the turnover of proteins. This work has implications for diagnosis of diseases and reduction of muscle protein degradation during steroid treatments for diseases such as asthma, cancer, arthritis and endocrine diseases. Thus, we also concur with the director that these proposed benefits would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

On appeal, the petitioner asserts that the director's focus was on the applicability of the alien employment certification process. She asserts that the focus should, instead, be on her record of achievement in the field. While the director did assert that the petitioner had not established that the alien employment certification process was inapplicable, the director also questioned the petitioner's influence in the field.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

While working towards her Ph.D., the petitioner worked under the direction of [redacted] a professor of chemistry at Washington University in St. Louis. Upon receiving her Ph.D., the petitioner began working at the same institution in the laboratory of [redacted], Chairman of the Department of Pediatrics at Washington University's School of Medicine and a professor of biology and pharmacology. [redacted] is also a member of the National Academy of Sciences. The petitioner has collaborated with [redacted], a distinguished professor at the Technion Institute of Technology in Haifa, Israel, and a Nobel Laureate. [redacted] received the Nobel Prize in Chemistry in 2004 for discovering the ubiquitin protein degradation system, the focus of the petitioner's research. We note that, according the curriculum vitae of [redacted] he has been collaborating with [redacted] since the early 1980's, long before the petitioner joined his laboratory.

[redacted] discusses the petitioner's Ph.D. research on the molecular pathway that leads from sunlight to skin cancer. The pathway is understood to involve sunlight causing a mutation whereby DNA polymerase attempts to copy photodamaged DNA and inserts an incorrect nucleotide. The petitioner focused on the mechanism by which the wrong nucleotide is inserted. The petitioner provided empirical evidence supporting a hypothesis explaining the common substitution of "A" nucleotides for abasic sites and bulky DNA damage. As of the date of filing, ten independent research teams had cited this work. As noted by the director, the remaining citations are from coauthors.

In studying the mechanism by which the newly discovered polymerase pol η (associated with a human genetic disorder) inserts the "A" nucleotide (thereby increasing the chance of skin cancer 4000 fold) required the petitioner to devise a new method for preparing the pure enzyme and a new plasmid to improve stability of the enzyme. [redacted] explains:

> In this case, she discovered that [the] pyrene nucleotide was inserted opposite any base, damaged or not, which led to the realization that pol η does not hold onto the templating base tightly, and that it can be easily displaced. Because the polymerase cannot extend from a pyrene nucleotide, pyrene nucleotide also functions as a chain terminating inhibitor that was found to be selective for pol η and constitutes a new class of polymerase inhibitors. This type of inhibitor might ultimately serve as a "morning after pill" for individuals suffering from a sun burn to prevent the development of skin cancer.

As of the date of filing, this work had been cited a few times, mostly by the petitioner's coauthors. Even as of the date of appeal, this work had not accumulated any additional citations. [redacted] also discusses work that had yet to be published and, thus, disseminated in the field. Therefore, this work had yet to be influential as of the date of filing and cannot be considered evidence of the petitioner's eligibility as of that date. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

[redacted] discusses the petitioner's collaboration with him and [redacted]. [redacted] asserts that the petitioner performed "the overwhelming majority of the work." In this study, the petitioner demonstrated "that abundance of several of the key proteins which regulate the development and differentiation of muscle changes during the course of muscle differentiation. Further, during muscle development the change in abundance is associated with specific protein synthesis and degradation." The petitioner "has established kinetic details on the molecular mechanisms responsible for the ubiquitin mediated degradation of several of these proteins." [redacted] predicts that this work "will eventually lead to identification of the precise molecular mechanisms whereby this group of regulatory proteins has the potential to be regulated by new drugs." [redacted] provides similar information, praising the petitioner's exceptional research knowledge and abilities.

[redacted] explains that the petitioner is currently focusing on the role of steroid hormones, used to treat asthma, cancer, arthritis and endocrine diseases, on the loss of muscle protein. While this work constitutes the proposed future benefits of the petitioner's work, it had yet to be published as of the date of filing and cannot be considered evidence of her past record of success.

[redacted] Head of the Molecular Interactions Group in the Protein Chemistry Laboratory at the National Cancer Institute (NCI), National Institutes of Health NIH), asserts that the petitioner has already made a major impact on the field of ubiquitin-protease system relating to muscle protein degradation. He notes that the petitioner presented this work at the American Society for Cell Biology. While he asserts that the work was pending publication, it was published just prior to the filing of the petition. He explains that the petitioner "has used state of the art approaches to elucidate the molecular mechanisms of how the ubiquitin-proteasome system controls the levels of several key proteins during muscle development and differentiation."

[redacted] a professor emeritus and Associate Dean for Admissions at the University of Chicago Pritzker School of Medicine, asserts that he knows the petitioner from her publications. He

asserts that her research on the ubiquitin system produced "a more complete picture of the intracellular molecular processes that underlie muscle development" and is important for identifying the best targets for drugs to address muscle related disorders such as muscle wasting.

[redacted] Director of the Division of Nephrology at the Albert Einstein College of Medicine, Yeshiva University, asserts that he knows of the petitioner's work through her publications and conference presentations. More specifically, he states:

> For example, not only [has the petitioner] provided detailed mechanisms underlying the regulation of muscle regulatory factors transcriptionally and post-translationally during muscle differentiation and development, she also discovered [an] additional critical mechanism for how the interaction between the major muscle regulatory factor and its inhibitor control muscle differentiation. Moreover, [the petitioner's] original and insightful observation on the relationship of the ubiquitin-proteasome mediated degradation of the transcription factor E2A and cell cycle holds great importance for our understanding on E2A regulation during muscle development. Of note, her results on E2A protein stability study could offer a logical explanation for the previously reported discrepancies on this issue.

The petitioner's article, coauthored with [redacted], was published in July 2005. The petition was filed August 29, 2005. In July and August of that year, 538 individuals downloaded the full article. The petitioner has not provided comparative data for other articles published during that time available for download. While the downloads and requests for reprints may reflect an interest in the petitioner's work, it does not reflect an ultimate reliance on her work. For this reason, citations are far more persuasive than downloads and requests for reprints.

The director, noting that some of the letters are from the petitioner's immediate circle of colleagues, dismisses all of the letters. We acknowledge that while letters from colleagues must be supported by more objective evidence, the submission of such letters is useful and does not somehow reduce the credibility of the remaining evidence.

That said, Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of a potential influence and a positive response in the field are less persuasive than letters that provide specific

examples of how the petitioner has already influenced the field. In addition, the most persuasive letters are often from independent references who were not only previously aware of the petitioner through her reputation but who have also applied her work.

We acknowledge that the petitioner has worked with a member of the National Academy of Science and has collaborated with a [redacted]. While we accord significant weight to the opinions of such accomplished colleagues, we will not presume that every alien who collaborates with a member of the academy or a [redacted] warrants a waiver of the alien employment certification process. In this matter, while both [redacted] praise the petitioner's skills and area of work and predict future influence, they fail to explain how her work has already influenced the field.

The independent letters attest to the potential for the petitioner's work to become influential in the future. They provide no examples, however, of research that has been initiated or changed direction as a result of the petitioner's work. While the petitioner has one moderately cited article, that article was not within her current area of research. The only article within that area was published right before the petition was filed. As such, it is difficult to gauge the impact of the work reported in that article. Without additional evidence that at least some of the researchers who downloaded the petitioner's work ultimately found it useful and relied on the petitioner's results, we cannot conclude that the number of downloads is significant.

In response to the director's request for additional evidence, counsel relies on a non-precedent decision by this office sustaining an appeal where the alien had a similar number of citations. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Second, this office has never implied that there is a set number of citations that warrant approval in all cases regardless of the field and the other evidence submitted. Rather, it is necessary to look at all of the evidence, including the content of the letters submitted.

While the petitioner's research in this matter is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.